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In The Supreme Court of the United States

COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO DIVISION OF DOMESTIC RELATIONS,
Petitioner,

v.

JOSEPH M. POPOVICH and, UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

CUYAHOGA COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION'S REPLY TO BRIEF OF THE UNITED STATES

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THE ISSUE OF THE STATE COURT'S ENTITLEMENT TO 11TH AMENDMENT IMMUNITY WAS PROPERLY RAISED IN THE SIXTH CIRCUIT

The suggestion by the United States that the money judgment giving rise to the Eleventh Amendment Immunity was not covered in the Notices of Appeal is not well taken.

The Department of Justice argues for the first time that the Sixth Circuit Court of Appeals did not have jurisdiction to hear this case. It claims that this is due to the fact that the State Court did not include all of the issues to be addressed in its "Notice of Appeal." This assertion is both inadequate and quite belated.

The DOJ suggests that its jurisdictional argument is so strong that it would have completely barred the appellate court's ability to hear the appeal. However, Popovich, the DOJ, and the *en banc* panel had the opportunity to raise any unresolved jurisdictional issues. On December 22, 1998, the parties agreed that all matters were properly before the Sixth Circuit.[1] Conveniently, the DOJ omits the fact that the Attorney General was served with the briefs clearly identifying the constitutional issue in September of 1999 and

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[1] Popovich received the Statement of Issues dated December 22, 1998 prior to the attorneys' conference, asking "are there any jurisdictional issues." The State Court would have filed a timely second protective notice on December 22, 1998 within the fourteen (14) days after Popovich's Notice of Appeal had any jurisdictional questions been raised.

again when letter briefs were filed in June of 2000. The history makes it clear that exhaustive efforts have been expended by all parties on the relevant issues in this case: to suggest that a fundamental jurisdictional issue went unnoticed by everyone strains credibility.

It only makes sense to raise a jurisdictional argument at the time the case is actually in the questioned jurisdiction. Waiting until a case reaches the highest court in the land to assert that the lower court lacked jurisdiction simply evidences the fact that this argument lacks merit and is interjected merely to detract from the important issues presented. Similarly, the "other substantial jurisdictional and prudential problems" raised may fairly be characterized as an exhaustive search of the record in this case as a way of saying this is not the right case.

While the DOJ offers case law to support its argument, the authorities cited are unconvincing. In fact, the leading cases support the exercise of jurisdiction. *See, e.g.*, *Becker v. Montgomery*, 532 U.S. 757, 767 (2001)("Other opinions of this Court are in full harmony with the view that imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court."); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988)("...a court may construe the Rules liberally in determining whether they have been complied with."); *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002)("When determining

whether an appeal from a particular district court action is properly taken, we construe the notice of appeal liberally and permit review where the intent of the appeal is obvious and the adverse party incurs no prejudice." (citing *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786, 788 (8th Cir. 2001)); *Laurino v. Tate*, 220 F.3d 1213, 1218 (10th Cir. 2000)(court should exercise jurisdiction where intent to appeal particular issue is clear).

Had the Sixth Circuit addressed this issue directly, the result would be the same. In *Harris v. United States*, 170 F.3d 607 (6th Cir. 1999), the Sixth Circuit allowed the appeal of a judgment that had not been included on the Notice of Appeal. The Court found there was no evidence of any prejudice to Appellee, especially since Appellee "did not even raise a jurisdictional objection to the petitioner's appeal until the court *sua sponte* ordered the matter briefed." *Harris*, 170 F.3d at 607.

The issue of the subject matter of an appeal is addressed in Rule 3(c)(1)(B) of the Federal Rules of Appellate Procedure. The rule states, "The notice of appeal must designate the judgment, order or part thereof being appealed . . . ." The DOJ asserts that compliance with Rule 3(c) is a "jurisdictional prerequisite" to an appeal. In support of this proposition, the DOJ relies on *Torres v. Oakland*, 487 U.S. 312, 318 (1988). However, a closer examination of *Torres*

reveals that the case, in fact, centers around Rule 3(c)(1)(A)[2] rather than Rule 3(c)(1)(B).

While *Torres* contains broad language regarding a more rigorous reading of Rule 3(c) as a whole, the DOJ ignores the fact that *Torres* was superseded by the 1993 Amendments to the Federal Rules of Appellate Procedure. Specifically, the Advisory Committee Notes on subdivision (c) of Rule 3 negate the strict reading of the rule mandated by *Torres* and instead recognize that appeals should not be dismissed on mere technicalities.

The DOJ's assertion that compliance with Rule 3(c) is a "jurisdictional prerequisite" to an appeal is not entirely correct. This Court has shied away from a rigid interpretation of the rule.

In *Foman v. Davis*, 371 U.S. 178 (1962), this Court held that there was appellate jurisdiction over a judgment that had not been specified in the Notice to Appeal. The Court found that there was no prejudice to the Appellee, in that both parties had briefed and argued the merits of the judgment on appeal. *Foman*, 371 U.S. at 181.

The Ninth Circuit Court of Appeals took this analysis a step further in *Meehan v. Cty. of Los Angeles*, 856 F.2d 102

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[2] Rule 3(c)(1)(A) pertains solely to the requirement that a notice of appeal's caption must name the specific parties taking the appeal; the Rule construed in *Torres* is thus not relevant to this case.

(9th Cir. 1988). "A two-part test is used to determine whether "intent" and "prejudice" are present: 'first, whether the affected party had notice of the issue on appeal; and, second, whether the affected party had an opportunity to fully brief the issue.'" *Meehan*, 856 F.2d at 105 (quoting *Lynn v. Sheet Metal Workers' Intern. Assoc.*, 804 F.2d 1471, 1481 (9th Cir. 1986)). The Court determined that the failure to include an issue in the notice of appeal did not prejudice the appellee. Because he had briefed the omitted issue, the Court determined that the appellee had notice of the issue. *Id.* at 105-106.

The Third Circuit Court of Appeals came to the same conclusion in *Williams v. Guzzardi*, 875 F.2d 46, 49 (3rd Cir. 1989) (asserting appellate jurisdiction over orders not specified in the notice of appeal if there is a connection between the specified and unspecified order and there has been a full opportunity to brief the issues.) *Williams* also discusses *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F.2d 1252 (3d Cir. 1977). Essentially coming to the same conclusion, *Elfman* held that a notice may be construed as identifying an unspecified order to be appealed if the intent to appeal the order was evident from the notice of appeal and the subsequent proceedings on appeal. *Elfman*, 567 F.2d at 1254.

THE CUYAHOGA COUNTY COURT OF COMMON PLEAS, DOMESTIC RELATIONS DIVISION IS AN ARM OF THE STATE OF OHIO AND AS SUCH ENJOYS 11TH AMENDMENT IMMUNITY

The United States questions whether the Cuyahoga County Court of Common Pleas, Domestic Relations Division is an "arm of the state" entitled to Eleventh Amendment immunity. This issue is a well-settled, fact-specific matter of state law.[3] Much like the federal judiciary, Ohio's state court system is created by constitution. The Ohio Constitution, Article IV, § 1 provides:

> The judicial power of the state is vested in a supreme court, courts of appeals, **courts of common pleas and divisions thereof**, and such other courts inferior to the supreme court as may from time to time be established by law.

Ohio Constitution, Art. IV, § 1 (emphasis added). Under this design, the Ohio courts of common pleas, including the

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[3] The question of whether the state court is an arm of the state does not prevent a grant of certiorari. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143 (1993) citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (state entities that claim to be "arms of the State" may take advantage of the collateral order doctrine permitting a "small class" of judgments that although not complete and final will be immediately appealable.)

Cuyahoga County Court of Common Pleas, Domestic Relations Division, are constitutional courts and not subject to elimination without a constitutional amendment.

Contrary to suggestion of the United States, Petitioner is a constitutionally mandated arm or branch of the government of the State of Ohio. Ohio Revised Code §§ 2743.01(A) and (B) (1993) and 2301.03(L) (1994); *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), *cert. denied*, 522 U.S. 914 (1997). No precedent from this Court suggests otherwise.

Eleventh Amendment immunity extends to state entities that are "arms of the state." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70 (1989); *Harman v. Ohio Dept. of Corr.* (1991), 74 Ohio App. 3d 703, 705, 600 N.E.2d 314. A state entity is an "arm of the state," if it would meet the definition of an "arm of the state" under an Eleventh Amendment immunity analysis. *Will*, 491 U.S. at 70; *Harman*, 74 Ohio App. 3d at 705. Therefore, if the Court of Common Pleas is an "arm of the state," it is immune from money damage suits by private parties under Title II of the Americans with Disabilities Act, Title 42 U.S.C. § 12101 et seq. ["ADA"].

In determining whether a state entity is an arm of the state, whether a judgment obtained against the entity will be paid out of the state treasury is the most critical issue. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47-48 (1994); *Estate of Ritter v. University of Michigan*, 851 F.2d 846, 850 (6th Cir.1988); *Hall v. Medical College of Ohio at Toledo*, 742

F.2d 299, 302 (6th Cir. 1984); *Blake v. Kline*, 612 F.2d 718, 723 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Because there is no evidence in the record addressing these factors, the United States' affirmative response is merely guess work with no basis.

The Sixth Circuit's holding in *Mumford* speaks directly to this issue. In *Mumford,* the Sixth Circuit analyzed the applicable Ohio statutory provisions and the record, applying the factors developed from prior case law. After careful consideration, the Circuit concluded: "an Ohio common pleas court is *not* a segment of county government, but an arm of the state for purposes of ... Eleventh Amendment immunity analyses." 105 F.3d at 269 (emphasis original). This holding remains undisturbed.

Instead, The United States relies upon two Ohio cases: *Dalton v. Bureau of Criminal Identification & Investigation*, 39 Ohio App. 3d 123, 530 N.E.2d 35 (1987) and *Tymcio v. State*, 52 Ohio App. 2d 298, 369 N.E.2d 1063 (1977). However, the Sixth Circuit expressly considered and rejected the arguments advanced by DOJ in *Mumford.* Discussing the impact of *Dalton* and *Tymcio* on its determination that common pleas courts are arms of the state, the court said:

> Nothing in either opinion mandates that a common pleas court should be construed as a component of county government for any purpose. To the contrary, those courts intimated that, in the broader sense, the common pleas courts remain instrumentalities of state government.

105 F.3d at 269, n. 7. Indeed, this holding is entirely consistent with the holding of Ohio's appellate courts. See *Dugan v. Civil Service Com'n of Akron*, 9 Ohio App. 3d 218, 219, 459 N.E.2d 618, 619 (1983) (an Ohio court is a creature of state constitutional and statutory law and is administered by state authorities; the state legislature has the authority to control the conditions of appointment, status, tenure, and discharge of court employees).

THE *ROOKER-FELDMAN*[4] DOCTRINE NO LONGER APPLIES TO THIS CASE

The United States' suggestion that review of claims for continuing injunctive relief are now barred by the doctrine of mootness is only correct if applied solely to the injunctive relief ordered in this case. However, the DOJ's argument rings hollow when considered alongside the fact that a money judgment has been entered against State Court. Unless the money judgment rendered in federal court is somehow mooted, the *Rooker-Feldman* doctrine does not bar review by this Court.

At issue now is the propriety of a money judgment against an Ohio State Court *for the manner in which it chose to accommodate Popovich's disability* during a disputed child custody and domestic violence hearing. This issue cannot be

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[4] This doctrine is based on this Court's holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

construed as asking a federal court to review, directly or indirectly, a state court's judicial decision. As the *en banc* decision chose to focus solely on the constitutional grounds, the position advanced by the DOJ that the case is moot and must pass *Rooker-Feldman* before presenting the issue ignores the basis of the decision below and the facts of the dispute. However, if this Court accepts the DOJ mandatory review position and that *Rooker-Feldman* bars this action, then this Court should grant *certiorari*, vacate the decisions below, and direct entry of dismissal.

If the Court wishes to vacate and remand with directions to dismiss, then the State Court agrees that the money judgment for matters submitted to the State Court is barred. Thus, the application of the *Rooker-Feldman* doctrine was not at issue once the circuit addressed the constitutionality of Title II of the ADA *en banc*.

CONCLUSION

For these reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. The petition for a writ of *certiorari* should be granted on the important questions presented that have escaped review to date.

Respectfully submitted,

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